

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

DUSTIN J. LACEY)	
Claimant)	
)	
VS.)	
)	
BLACKBURN CONSTRUCTION CO.)	
Respondent)	Docket No. 1,026,813
)	
AND)	
)	
COMMERCE & INDUSTRY INS. CO.)	
Insurance Carrier)	

ORDER

Claimant requests review of the March 17, 2006 preliminary hearing Order entered by Administrative Law Judge (ALJ) John D. Clark.

ISSUES

Following a rather lengthy preliminary hearing during which the claimant testified as well as two of respondent's representatives, and the submission of the deposition of Rodney Lacey, the ALJ denied claimant's request for workers compensation benefits. In his Order, the ALJ expressly stated that "[t]he testimony of Steve Carlisle is more persuasive than the other witnesses" and that "[c]laimant has not sustained his burden of proving that he was injured out of and in the course of his employment with the [r]espondent."¹ Thus, all benefits were denied.

Claimant appeals this Order claiming that the ALJ erred. Claimant maintains that "[w]hen the entire record is considered, claimant has met his burden of proof"² and is entitled to the benefits he seeks.

¹ ALJ Order (Mar. 17, 2006).

² Claimant's Brief at 5-6 (filed Apr. 12, 2006).

Respondent contends the Board should affirm the ALJ's preliminary hearing Order in all respects.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

The resolution of this claim turns nearly exclusively on the credibility of the witnesses. Claimant has his version of the events which he maintains led to his injury on October 28, 2005. He maintains that he injured his back when he was operating a fork lift and some pipes fell to the ground. Claimant testified that he got off the fork lift and attempted to lift one end of the pipe in order to slip a small block of wood under it so he could then pick up the pipe with the fork lift. This accident purportedly took place between 9:30 a.m. and 10:00 a.m. on October 28, 2005. Claimant indicates his back "locked up" and he immediately experienced pain.³ Claimant knew he was hurt, but did not tell any of his superiors of the injury. He worked until noon then left for lunch. He did not return to work that day. Instead, he returned to his home in Garnett, Kansas to serve out a weekend jail sentence.

This version of the events was corroborated by claimant's brother, Rodney Lacey. Mr. Lacey testified that he watched claimant while he was working the fork lift on October 28, 2005. He also testified that he saw the pipes fall and watched claimant get off the fork lift and attempt to lift a piece of pipe. Mr. Lacey further testified that claimant complained about his back pain while at lunch that day and that he took claimant back to the hotel as he could no longer work.

The pain in claimant's back and legs got worse over the weekend and on the following Tuesday, November 1, 2005, he went to the emergency room in Garnett, Kansas. The ER record indicates claimant gave a history of attempting to lift a piece of pipe. The next day claimant contacted respondent and tried to report his injury. When he was rebuffed, he contacted the carrier directly and he was referred to a local physician, who then referred him to Dr. Kindred, an orthopaedic physician. Dr. Kindred's records indicate claimant had a herniated disk at L5-S1 and L4-5 impinging on the left L5 nerve root. It appears claimant provided Dr. Kindred with a similar history of his injury, which is contained within the ER records and to that claimant provided at the preliminary hearing.

In stark contrast to claimant's recitation of the accident, respondent's representatives, Steve Carlisle and Robert Barnes, testified to an entirely different series of events. According to Mr. Carlisle, claimant was not moving pipe on October 28, 2005. Rather, Mr. Carlisle worked directly with claimant from the beginning of the workday until

³ P.H. Trans. at 11-12.

noon. The two were assigned to hydro-test pipes that were already installed. According to Mr. Carlisle, there was no reason for claimant to be using a fork lift and in fact, he remained with Mr. Carlisle the entire morning, retrieving materials and tools as needed. Although Mr. Carlisle confirmed that claimant was gone from his sight at approximately 9:00 a.m. to go to the restroom, claimant returned before 9:30 a.m. and at no time during that morning's work did claimant complain of back or leg pain, report an accident, nor express any difficulties performing his work.

Mr. Carlisle's version of the events was corroborated by Robert Burns, the job superintendent. He assigned Mr. Carlisle and claimant to perform hydro-testing on pipe that had been previously installed. He did not believe claimant used a fork lift that day, nor would there be any reason to do so. Moreover, when Mr. Burns asked claimant if he was planning on returning to the work-site after lunch, claimant did not mention anything about an injury earlier in the morning.

Both claimant, Mr. Burns and Mr. Carlisle agree that claimant told his employer he was going to return to work after lunch, but that claimant did not return as promised. No one knew claimant was asserting a work-related injury until several days later when claimant called Bill Mills, another supervisor.

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.⁴ "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."⁵

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has a responsibility of making its own determination.⁶

Following the preliminary hearing, the ALJ denied claimant's request for benefits. He concluded that Mr. Carlisle's testimony was more persuasive than the other witnesses. Thus, he was not persuaded that claimant sustained an accidental injury arising out of and in the course of his employment with respondent.

⁴ K.S.A. 2005 Supp. 44-501(a).

⁵ K.S.A. 2005 Supp. 44-508(g).

⁶ *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212 (1991).

The Board finds that where there is conflicting testimony, as in this case, credibility of the witnesses is important. Here, the ALJ had the opportunity to personally observe the claimant and respondent's representatives testify in person. In denying claimant's request for medical treatment and temporary total disability benefits, the ALJ believed their testimony over the claimant's testimony. The Board concludes that in situations such as this, some deference may be given to the ALJ's findings and conclusions because he was able to judge the witnesses' credibility by personally observing them testify. Accordingly, the ALJ's preliminary hearing Order is affirmed in all respects.

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge John D. Clark dated March 17, 2006, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of May, 2006.

BOARD MEMBER

c: Timothy M. Alvarez, Attorney for Claimant
Jon E. Newman, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director